

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

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PLR-112068-20

Date:

September 22, 2020

### Legend:

Taxpayer =

Advisor =

Administrator =

State =

Firm 1 =

Firm 2 =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

X =

Dear :

This ruling responds to a letter dated April 29, 2020, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election under section 852(b)(8)(A) of the Internal Revenue Code (the "Code") ("section 852(b)(8)(A) election") for Year 1.

## FACTS

Taxpayer is a corporation organized under the laws of State and is a non-diversified, closed-end management investment company that has elected to be treated as a business development company under the Investment Company Act of 1940. Taxpayer has elected to be a regulated investment company ("RIC") under subchapter M of chapter 1 of the Code. Taxpayer has operated in a manner intended to qualify as a RIC at all times since it commenced operations. Taxpayer uses a fiscal year ending September 30 as its taxable year and an accrual method as its overall method of accounting.

Advisor, an affiliate of Taxpayer, manages Taxpayer pursuant to an advisory and management agreement. Administrator, also an affiliate of Taxpayer, provides administrative services to Taxpayer pursuant to an administration agreement. None of Taxpayer, Advisor, or Administrator has an internal tax department. Taxpayer has engaged Firm 1 to perform income tax compliance and consulting services.

Taxpayer's federal income tax return, Form-1120 RIC, *U.S. Income Tax Return for Regulated Investment Companies*, for Year 1 ("Year 1 Return") was due on Date 1. Taxpayer timely filed Form 7004, *Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns* to extend the due date of its Year 1 Return to Date 2.

Taxpayer provided Firm 1 with the information necessary to prepare Taxpayer's Year 1 Return. Based on discussions between Firm 1 and Taxpayer's Chief Financial Officer, Firm 1 understood that Taxpayer intended to make a section 852(b)(8)(A) election for Year 1 to defer its "qualified late-year loss" (as defined in section 852(b)(8)(B)), consisting of its "post-October capital loss" (as defined in section 852(b)(8)(C)). Accordingly, in completing Schedule M-1, *Reconciliation of Income (Loss) per Books with Income per Return* ("Schedule M-1"), Line 5, *Expenses recorded on books this year not included on this return (itemize)* ("Line 5"), and associated Statement 6, Firm 1 reported that Taxpayer deferred a post-October net capital loss in the amount of x. However, due to an administrative oversight, Firm 1 inadvertently failed to complete Schedule K, *Other Information* ("Schedule K"), line 12, *Section 852(b)(8) election*.

On or about Date 3, Firm 1 provided Taxpayer with a draft of the Year 1 Return. During its review, Taxpayer failed to discover that Schedule K, line 12, had not been completed. On or about Date 4, Taxpayer provided Firm 1 with review comments on the draft Year 1 Return.

On Date 5, Firm 1 transmitted the final version of the Year 1 Return to Taxpayer. During its final reviews of the Year 1 Return, neither Taxpayer nor Firm 1 management identified that Schedule K, line 12, had not been completed. Taxpayer timely filed its Year 1 Return on Date 2.

On Date 6, as part of its audit of Taxpayer's financial statements for Year 1, a partner at Firm 2, Taxpayer's financial auditor, observed that Taxpayer's Year 1 Return reflected that Taxpayer had deferred the Taxpayer's post-October net capital loss, but that Taxpayer had not completed Schedule K, line 12, indicating that Taxpayer was making a section 852(b)(8)(A) election.

Taxpayer's management immediately contacted Firm 1 to determine if the Year 1 Return that Taxpayer provided to Firm 2 was a complete copy, and if so, what remedial actions, if any, could be taken to ensure a valid section 852(b)(8)(A) election was in place for Year 1. Firm 1 confirmed that the Year 1 Return provided to Firm 2 was a complete copy, and a managing director at Firm 1 notified Taxpayer of the possibility of requesting relief for a late section 852(b)(8)(A) election under sections 301.9100-1 through 301.9100-3.

Taxpayer makes the following additional representations:

1. The request for relief was filed before the failure to make the regulatory election was discovered by the Internal Revenue Service ("Service").
2. Granting the relief requested will not result in Taxpayer having a lower tax liability in the aggregate for all years to which the election apply than it would have had if the election had been timely made (taking into account the time value of money).
3. Taxpayer does not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 at the time it requested relief and the new position requires or permits a regulatory election for which relief is requested.
4. Being fully informed of the required regulatory election and related tax consequences, Taxpayer did not choose to not file the election.
5. Taxpayer is not using hindsight in requesting relief. No specific facts have changed since the due date for making the election that make the election more advantageous to Taxpayer.
6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer for the taxable year in which the election should have been filed, nor for any taxable year(s) that would have been affected by the election had it been timely filed.

In addition, affidavits on behalf of Taxpayer and Firm 1 have been provided as required by sections 301.9100-3(e)(2) and (3).

## LAW AND ANALYSIS

Section 852(b)(8)(A) provides that a RIC may elect for any taxable year to treat any portion of any qualified late-year loss for such taxable year as arising on the first day of the following taxable year. The term “qualified late-year loss” means (i) any post-October capital loss, and (ii) any late-year ordinary loss. See section 852(b)(8)(B). The term “post-October capital loss” means (i) any net capital loss attributable to the portion of the taxable year after October 31, or (ii) if there is no such loss, (I) any net long-term capital loss attributable to such portion of the taxable year, or (II) any net short-term capital loss attributable to such portion of the taxable year. See section 852(b)(8)(C).

Notice 2015-41, 2015-24 I.R.B. 1058, provides that, pending further guidance, a RIC makes a section 852(b)(8)(A) election for a taxable year by giving effect to its elective deferral in computing its capital gains and losses for that taxable year and by completing its income tax return (including any necessary schedules) for the taxable year in accordance with the instructions for those items applicable to the election.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section before the failure to make the regulatory election is discovered by the Service; (ii) failed to make the election because of intervening events beyond the taxpayer’s control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer’s experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. A taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer (i) seeks to alter a return position for

which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

### CONCLUSION

Based upon the information submitted and representations made, we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to make a section 852(b)(8)(A) election. Accordingly, Taxpayer has 90 days from the date of this letter to make its intended election.

This ruling is limited to the timeliness of the filing of the section 852(b)(8)(A) election. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Taxpayer otherwise qualifies as a RIC under subchapter M of chapter 1 of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayer is not lower in the aggregate for all years to which the election applies than such tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Steven Harrison  
Branch Chief, Branch 1  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

cc: